United Overseas Bank (M) Bhd v KB Fashions Sdn Bhd & Ors

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-676 OF 1998
ZALEHA ZAHARI J
28 AUGUST 2000

Banking *— Securities for advances — Guarantee — Conclusive evidence clause — Effect of — Whether court bound by clause*

Banking *— Securities for advances — Guarantee — Demand for payment — Notices of demand sent to guarantors at address specified in letter of guarantee — Proof of service of notices of demand — Whether notices of demand issued were valid and duly served on the guarantors*

Civil Procedure *— Summary judgment — Appeal — Appeal against decision of registrar allowing O 14 application — Whether triable issues raised — Rules of the High Court 1980 O14*

The plaintiff granted various banking facilities ('the said facilities') to the first defendant subject to the terms and conditions specified in the plaintiff's letter of offer. The second, third and fourth defendants ('the guarantors') were guarantors pursuant to a letter of guarantee. According to the plaintiff, the first defendant had failed to operate the said facilities satisfactorily. As a result thereof, the plaintiff, through their solicitors, sent notices of demand to the defendants by way of AR registered post. The notices of demand were sent to the first defendant at the address stated in the plaintiff's letter of offer and in the case of the guarantors, they were sent to the address stated in the letter of guarantee. The plaintiff instituted these proceedings after the defendants failed to repay the amount demanded. The senior assistant registrar allowed the plaintiff's application to enter summary judgment against the defendants. The defendants appealed and contended that there were triable issues involved and as such, the plaintiff was not entitled to enter summary judgment against the defendants. Firstly, the defendants argued that the court should not accept the acknowledgement of receipt exhibited by the plaintiff as proof of service of the notices of demand on the defendants on the ground that the person who had acknowledged receipt of the same had no authority to do so. Secondly, the defendants argued that the security deposit that had been paid by the first defendant had not been taken into account by the plaintiff in computing the amount outstanding and payable.

Held, dismissing the appeal:

(1) Pursuant to the letter of guarantee, the guarantors had agreed that any demand thereunder may be made by the plaintiff's solicitors and sent by post to the guarantors at their address specified in the letter of guarantee. Furthermore, the notices of demand had been

properly addressed and posted and duly served on the defendants as evident from the acknowledgment as receipt by the stamping of the seal of the first defendant. Therefore, the notices of demand issued were valid and had been duly served on all the defendants (see p 680D–G).

(2) The security deposit paid by the first defendant had been taken into account in computing the amount outstanding and the plaintiff had in fact written to the defendants to notify them regarding the upliftment of the security deposit. In addition, the guarantors had agreed, by virtue of the conclusive evidence clause contained in the letter of guarantee, that a statement signed by any of the plaintiff's officers as to the liabilities for the time being due from the first defendant shall be final and conclusive evidence against the guarantors of the first defendant's indebtedness for all purposes including legal proceedings. As such, the court was bound to accept the amount certified by the plaintiff as representing the correct amount outstanding and payable by the defendants (see pp 679I–680B).

(3) Accordingly, the defendants had failed to raise any issue to be tried and this was a plain and obvious case warranting the entry of summary judgment (see p 681A–B).

[Bahasa Malaysia summary

Plaintif telah memberi kemudahan-kemudahan bank ('kemudahan-kemudahan tersebut') kepada defendan pertama tertakluk kepada terma-terma dan syarat-syarat di dalam surat tawaran plaintif. Defendan-defendan kedua, ketiga dan keempat ('penjamin-penjamin tersebut') merupakan penjamin mengikut surat jaminan. Menurut plaintif, defendan pertama gagal menggunakan kemudahan-kemudahan tersebut dengan betul. Seterusnya, plaintif telah, melalui peguam-peguamnya, menghantar notis tuntutan kepada defendan-defendan melalui surat AR berdaftar. Notis tuntutan tersebut telah dihantar kepada defendan pertama di alamat yang ternyata di dalam surat tawaran plaintif, dan dalam kes panjamin pula, notis tersebut dihantar ke alamat yang ternyata di dalam surat jaminan. Plaintif telah memulakan prosiding ini setelah defendan-defendan gagal menjelaskan amaun yang dituntut. Penolong kanan Pendaftar telah membenarkan permohonan plaintif untuk mencatatkan penghakiman terus terhadap defendan-defendan. Defendan-defendan merayu dan menyatakan bahawa terdapat isu-isu yang boleh dibicarakan dan oleh itu, plaintif tidak berhak mencatatkan penghakiman terus terhadap defendan-defendan. Pertamanya, defendan-defendan menyatakan bahawa mahkamah tidak sepatutnya menerima pengakuan penerimaan yang diekshibitkan oleh plaintif sebagai bukti penyampaian notis-notis tersebut ke atas defendan-defendan oleh kerana orang yang telah mengakui pemerimaan notis tersebut tiada kuasa untuk membuat pengakuan tersebut. Keduanya, defendan-

A defendan menyatakan bahawa simpanan jaminan yang telah dibayar oleh defendan pertama tidak diambil kira oleh plaintif dalam pengiraan hutang yang belum dibayar.

Diputuskan, menolak rayuan tersebut:

B (1) Menurut surat jaminan, penjamin-penjamin telah bersetuju bahawa tuntutan-tuntutan boleh dibuat oleh peguam plaintif dan boleh diposkan kepada penjamin-penjamin di alamat yang dinyatakan di dalam surat jaminan. Seterusnya, notis-notis tuntutan telah dialamatkan, diposkan dan disampaikan ke atas defendan-defendan dengan betul dan ini dibuktikan dengan C pengakuan penerimaan yang dicap dengan cap defendan pertama. Oleh itu, notis-notis tuntutan yang diisukan adalah sah dan telahpun disampaikan kepada defendan-defendan (lihat ms 680D–G).

(2) Simpanan jaminan yang dibayar oleh defendan pertama telah D diambil kira dalam pengiraan jumlah hutang yang belum dijelaskan, dan plaintif juga telah menulis kepada defendan-defendan untuk memberitahu defendan-defendan mengenai peningkatan simpanan jaminan tersebut. Selain daripada itu, penjamin-penjamin tersebut telah bersetuju bahawa, mengikut klausa keterangan muktamad di dalam surat jaminan, penyata E yang telah ditandatangani oleh mana-mana pegawai plaintif berkenaan dengan liabiliti pada masa kini yang perlu dijelaskan oleh defendan pertama adalah keterangan yang terakhir dan muktamad terhadap penjamin-penjamin hutang defendan pertama untuk segala tujuan, termasuk prosiding undang-undang. Oleh itu, mahkamah terpaksa menerima jumlah yang F disahkan oleh plaintif sebagai jumlah hutang yang perlu dijelaskan oleh defendan-defendan yang tepat (lihat ms 680H–681A).

(3) Defendan-defendan gagal membangkitkan isu yang boleh dibicarakan, dan ini merupakan kes yang jelas yang mewajarkan catatan penghakiman terus (lihat ms 681A–B).

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Notes

For cases on guarantee, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1454–1493.

For cases on summary judgment, see 2(2) *Mallal's Digest* (4th Ed, H 1998 Reissue) paras 4372–4778.

Legislation referred to

Rules of the High Court 1980 O 14

Azmani Abdul Hamid (*Chew Sien Chee & Co*) for the appellants/ I defendants.

V Arivanandhan (*Cheong Wai Ming & Van Buerle*) for the respondent/ plaintiff.

Zaleha Zahari J:On 7 July 1999 I dismissed the defendants' appeal against the senior assistant registrar's decision dated 16 March 1999 in allowing the plaintiff's application for summary judgment (encl (4)) against the defendants with costs. My reasons are as follows. A

The plaintiff caused a writ and statement of claim to be issued against the defendants on 27 August 1998. Upon the defendants filing an unconditional appearance on 9 May 1997 the plaintiff proceeded to file encl (4), an application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC') against all of the defendants. B

The affidavit of the plaintiff in support of the application for summary judgment was that as affirmed by Woon Siong Huai on 12 October 1998 (encl (3)) and that affirmed by Ong Chin Hwa affirmed on 22 November 1998 (encl (6)). The defendants are opposing the application for summary judgment against them through the affidavit of the fourth defendant, Koh Kwang Yeow, affirmed on 27 October 1999 (encl (5)). C

The background facts as disclosed from the affidavits filed in support of and in opposition to the application for summary judgment are as follows. The plaintiff contended that at the request of the first, second, third and fourth defendants they had granted overdraft, letters of credit, trust receipt and bankers acceptance facilities of RM1,600,000 ('the said facilities') to the first defendant subject to the terms and conditions specified in the letter of offer dated 13 January 1997 (exh 'OCH-2', encl (6)). The facilities granted to the first defendant were subject to review and variation from time to time at the plaintiff's sole discretion. D E

The second, third and fourth defendants were guarantors pursuant to a Letter of Guarantee dated 27 January 1997 (exh 'WSH-2' encl (3)]. The court took note of the fact that the address of the second, third and fourth defendants specified in the letter of guarantee is the same as that of the first defendant, ie '4, Lorong Janggus Empat, Taman Makok, 14000 Bukit Mertajam'. F

According to the plantiff the first defendant had failed to operate the overdraft and/or banking facilities and accommodation granted to the satisfaction of the plaintiff. On 6 August 1998 the plaintiff, through their Solicitors, issued notices of demand addressed to the defendants (exh 'WSH-4', encl (3)) which were sent by AR registered post. The notice of demand stipulated that should the defendants fail to settle the amount certified to be outstanding as at 1 August 1998 amounting to RM883,032.34 (together with interest to accrue thereon as stipulated in the said notice) within seven days, the plaintiff would institute legal proceedings. Consequential upon the defendants' failure to settle the sum demanded within the time prescribed, on 27 August 1998, the plaintiff instituted these proceedings. G H

The notice of demand issued by the plaintiff to the defendants bore a common address, ie in the case of the first defendant that stipulated in the letter of offer, whilst in the case of the second, third and fourth defendants to the address held out in the letter of guarantee, which is 'No 4, Lorong Janggus Empat, Taman Makok, 14000 Bukit Mertajam'. The court further I

notes that in the case of the second and fourth defendant, the notice of demand was also sent to the following addresses:

(a) Second defendant: Koh Boon How
No 39, Lorong Nangka 8
Taman Desa Damai
14000 Bukit Mertajam

(b) Fourth defendant: Koh Kwang Yeow
No 99, Jalan Binjai
Taman Sri Rambai
14000 Bukit Mertajam

According to the certificate of outstanding account dated 9 October 1998 (exh 'WSH-3', encl (3)) issued by the plaintiff, as at 1 August 1998, the first defendant owed the plaintiff the sum of RM883,032.34 as particularized in the said certificate.

Before I deal with the arguments of counsel before the court it is pertinent to note that although many issues were raised in the defendants' affidavit-in-reply the defendants' counsel chose not to address this court on most of them in his submission. In these circumstances, in making a considered decision in this appeal, the court will proceed on the basis that the issues not expressly dealt with by the defendants' counsel in his submissions are deemed to have been abandoned.

Only two issues were raised by the defendants' counsel. Firstly, according to the defendants' counsel, the plaintiff's claim was premature. He was of the view that based on para 13 exh 'WSH-2' encl (3), the obligation on the part of the defendants to pay only arises upon being served with a notice of demand. On the evidence before the court the defendants' counsel submitted that the defendants have not, to date, been served with a notice of demand. According to him this court should not accept the acknowledgement of receipt held out by the plaintiff in exh 'WSH-4' encl (3) as proof of service of the notice of demand on the defendants on the ground that the person who acknowledged receipt of the said notice of demand had no authority to do so.

Secondly, on the certificate of indebtedness issued by the plaintiff, the court's attention was drawn to cl 6 exh 'WSH-1' by which provision the first defendant was required to pay a security deposit. The defendants' contention is that this security deposit paid had not been taken into consideration by the plaintiff in computing the amount outstanding and payable.

According to the defendants' counsel these two issues were triable issues and the plaintiff was not entitled to enter summary judgment against the defendants.

The plaintiff's counsel response to these two issues was as follows. Firstly, on the issue of whether the security deposit paid by the first defendant had been taken into account in computing the amount outstanding, counsel for the plaintiff submitted that on the affidavit

evidence presented before the court this sum had clearly been taken into consideration in computing the sum outstanding and the defendants had duly been notified of this fact. The court's attention was drawn to a letter dated 22 June 1998 (exh 'OCH-3, encl (3)) where the plaintiff notified the defendants of the upliftment of a total fixed deposit amounting to RM759,550.55.

The plaintiff's counsel also submitted that the second, third and fourth defendants were also bound by the conclusive evidence clause of para 12 exh 'WSH-2' which reads:

> A statement signed by your manager or any one of your officers as to the monies and liabilities for the time being due or incurred to you from or by the customer shall be final and conclusive evidence against us of the indebtedness of the customer to you for all purposes including legal proceedings.

In this situation the plaintiff's counsel submitted that this court was bound to accept the certificate of indebtedness issued by the plaintiff as representing the correct amount outstanding and payable by the defendants.

On the denial of receipt of the notice of demand issued by the plaintiff, the court's attention was drawn to para 13 exh 'WSH-2' encl (3) by which provision the second, third and fourth defendants had agreed that:

> ... any demand for payment or any other demand under this guarantee may be made by your manager or any one of your officers or by any person or firm for the time being acting as your solicitor or solicitors by letter sent by post adddressed to us at our address specified herein or at our last known place of residence or business and a demand or notice so sent shall be deemed to be served four business days following the day on which it is posted. In proving such service it shall be sufficient to prove that the notice of demand was properly addressed and posted notwithstanding that the said notice of demand may subsequently be returned undelivered by the postal authorities.

It was the plaintiff's counsel's submission that the notices of demand issued (exh 'WSH-4' encl (3)) to the defendants were valid. That they had been properly addressed and posted and duly served on the defendants as evident from the acknowledgment as receipt by the stamping of the seal of the first defendant, of which company the second, third and fourth defendants were directors. The court was therefore urged to hold that notice of demand had been duly served on all of the defendants.

The plaintiff's counsel submitted that there was no triable issue and that the plaintiff was therefore entitled to summary judgment against all of the defendants and urged this court to confirm the order made by the registrar on 16 March 1999 in allowing the plaintiff's application for summary judgment and to dismiss the defendants' appeal with costs.

I am in total agreement with the submission of counsel for the plaintiff on the two issues raised by the defendants. I hold that on the facts of this case the notices of demand issued were valid and that they had been duly served on all of the defendants and that the defendants were wrong in contending that the plaintiff's case is premature. I also hold that the

A conclusive evidence clause applies to the defendants and that this court is bound to accept the amount certified by the plaintiff as representing the correct amount outstanding and payable by the defendants.

I therefore hold that the defendants have failed to raise any issue to be tried and that this is a plain and obvious case warranting the entry of B summary judgment. I accordingly upheld the senior assistant registrar's decision in allowing the plaintiff's application for summary judgment and the defendant's appeal was accordingly dismissed with costs.

Order accordingly.

C Reported by Andrew Christopher Simon

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